Ahmad Syukry bin Ismail Erayu v Rasidah bt Ratag

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-41(Ors)-10–07 OF 2024
MUNIANDY KANNYAPPAN J
3 AUGUST 2025

Family Law — Protection — Interim protection order ('IPO') — Application to set aside order allowed — Appellant appealed against magistrate's decision to allow application ex parte — Whether magistrate's order allowing respondent's application to set aside IPO ex parte was procedurally appropriate

The appellant ('father') and the respondent ('mother'), who had a child together, were divorced. Due to incidences of abuse etc, the mother was prevented from having access to the child and an interim protection order ('IPO') was issued against her, under s 4 of the Domestic Violence Act 1994. Thereafter, an application was made by mother of the child to set aside the IPO which was given to the father of the child. The magistrate had allowed the application ex parte, as only the mother of the child was party to the setting aside application. The father of the child and the Social Welfare Department ('JKM') was not cited as parties. The issue for consideration was whether the magistrate's order which had allowed the mother's application to set aside the IPO ex parte was procedurally appropriate.

Held:

(1) The father, having obtained the IPO, had a legitimate expectation that the order would remain in force unless good cause was shown for its variation or discharge, and that he would be given an opportunity to be heard when there was contest vide an application to have it set aside. The setting aside of the IPO without his knowledge or input effectively deprived him of the protection afforded by the order and potentially jeopardised the child's welfare, without him having a say in the matter. Likewise, JKM played a crucial role in child protection. To set aside an IPO without their knowledge or input undermined their statutory functions and the overarching public interest in child protection. The order made by the magistrate allowing the mother's application to set aside the IPO ex parte was made in clear violation of the audi alteram partem rule. The failure to cite the father and JKM as parties and to afford them an opportunity to be heard was a serious procedural irregularity that vitiated the order. Therefore, the order of the magistrate allowing the application to set aside the IPO was set aside. Consequently, the IPO originally granted to the father was reinstated pending a proper hearing

of the mother's application to set aside the IPO, with all necessary parties (including the father and JKM) being given due notice and a full opportunity to present their respective cases. The matter was remitted to another magistrate for a fresh hearing of the mother's application to set aside the IPO, ensuring strict compliance with the principles of natural justice (see paras 8–9 & 15–17).

[Bahasa Malaysia summary

Pemohon ('bapa') dan responden ('ibu'), yang mempunyai seorang anak bersama, telah bercerai. Disebabkan insiden penderaan dan sebagainya, ibu telah dihalang daripada mempunyai akses kepada anak dan satu perintah perlindungan interim ('PPI') telah dikeluarkan terhadapnya, di bawah s 4 Akta Keganasan Rumah Tangga 1994. Selepas itu, satu permohonan telah dibuat oleh ibu anak tersebut untuk mengenepikan PPI yang diberikan kepada bapa anak tersebut. Majistret telah membenarkan permohonan tersebut secara ex parte, kerana hanya ibu anak tersebut adalah pihak yang memohon untuk mengenepikan PPI tersebut. Bapa anak dan Jabatan Kebajikan Masyarakat ('JKM') tidak dijadikan sebagai pihak dalam permohonan tersebut. Isu untuk pertimbangan ialah sama ada arahan majistret yang membenarkan permohonan ibu untuk mengenepikan PPI secara ex parte adalah wajar dari segi prosedur.

Diputuskan:

(1) Bapa, selepas memperoleh PPI, mempunyai jangkaan yang sah bahawa perintah tersebut akan kekal berkuat kuasa kecuali sebab yang kukuh dibuktikan untuk mengubah atau membatalkannya, dan bahawa dia akan diberi peluang untuk didengar apabila terdapat pertikaian melalui permohonan untuk mengenepikannya. Pengenepian PPI tanpa pengetahuannya atau input daripadanya secara efektif telah menghilangkan perlindungan yang diberikan oleh perintah tersebut dan berpotensi membahayakan kebajikan anak, tanpa dia diberi peluang untuk menyatakan pendapat dalam perkara tersebut. Begitu juga, JKM memainkan peranan penting dalam perlindungan anak. Pengenepian PPI tanpa pengetahuan atau input mereka telah menjejaskan fungsi statutori mereka dan kepentingan awam yang lebih luas terhadap perlindungan anak. Perintah yang dibuat oleh majistret yang membenarkan permohonan ibu untuk mengenepikan PPI secara ex parte adalah jelas melanggar aturan audi alteram partem. Kegagalan untuk menyebut bapa dan JKM sebagai pihak dan memberi mereka peluang untuk didengar ialah suatu luar aturan prosedur yang serius yang telah mencacatkan perintah tersebut. Oleh itu, perintah majistret yang membenarkan permohonan untuk mengenepikan PPI tersebut telah diketepikan. Sehubungan itu, PPI yang asalnya diberikan kepada bapa dikembalikan sehingga satu pendengaran yang sewajarnya terhadap

permohonan ibu untuk mengenepikan PPI diadakan, dengan semua pihak berkepentingan (termasuk bapa dan JKM) diberi notis yang sewajarnya dan peluang penuh untuk mengemukakan kes masing-masing. Perkara tersebut dihantar semula kepada majistret lain untuk pendengaran baharu permohonan ibu untuk mengenepikan PPI, memastikan pematuhan ketat terhadap prinsip keadilan asasi (lihat perenggan 8–9 & 15–17).]

Cases referred to

B (Care Proceedings: Notification of Father without Parental Responsibility), Re [1999] 2 FLR 408 (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
Ridge v Baldwin [1964] AC 40, HL (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 26, 50(2)
Criminal Procedure Code s 307
Domestic Violence Act 1994 s 4

Sreedhara Naidu (Naidu Chambers) for the appellant.
Nurul Huda Razali (with Anis Qistina bt Abdul Malek) (Haniff Khatri) for the respondent.

Muniandy Kannyappan J:

BACKGROUND FACTS

[1] Central to the dispute in the present case is the child, whom belongs to both the father and mother. They are divorced. Due to incidences of abuse etc, the mother was prevented from having access to the child and to clothe it with validity under the law, an interim protection order ('IPO') was issued against her under s 4 of the Domestic Violence Act 1994 ('DVA'/Act 521).

[2] Progressing from there, an application was made by mother of the child to set aside the IPO dated 7 December 2023 which was given to the father of the child, as the mother was supposed to have physically abused the child, thus found unsuitable to live with the mother.

[3] The magistrate had allowed the application ex parte, as only the mother of the child was party to the setting aside application. The father of the child and the Social Welfare Department ('JKM'), was not cited as parties. Thus, the order was made by the magistrate without adherence to the *audi alteram partum* rule, according right to be heard by the father and the representative of the JKM.

[4] Hence, the core issue before this court, wherein its appellate jurisdiction was invoked pursuant to s 307 of the Criminal Procedure Code (CPC/Act 593) read together with s 26 of the Courts of Judicature Act 1964 ('CJA'/Act 91), is the procedural propriety of the order made by the magistrate, which had allowed the mother's application to set aside the IPO ex parte.

FINDINGS

[5] The foregoing, will address the implications of the ex parte order made by the magistrate court, specifically in light of the fundamental principle of *audi alteram partem*. As emphasised, the magistrate had allowed the ex parte application to set aside the IPO. It is undisputed that neither the father, who was the beneficiary of the original IPO and had a direct interest in its continuance, nor the JKM which has a statutory duty to protect children, were cited as parties to the setting aside application. Consequently, they were not afforded any opportunity to present their respective cases or respond to the mother's assertions.

[6] The Latin maxim *audi alteram partem* means 'hear the other side' or 'let the other side be heard'. It is a cornerstone of natural justice and is universally recognised as a fundamental principle of fair procedure. This rule dictates that no person should be condemned, or have their rights or interests adversely affected, without being given a fair opportunity to be heard. The importance of this rule has been emphasised in numerous judicial pronouncements. As stated by Lord Denning MR in *Ridge v Baldwin* [1964] AC 40:

> It is a principle of natural justice that no man is to be condemned unheard, and that no man is to be deprived of his property without being given an opportunity of being heard.

While *Ridge v Baldwin* specifically concerned disciplinary proceedings, the principle is of universal application to any decision-making process that affects rights or interests. In the Malaysian context, the principle of *audi alteram partem* is deeply entrenched in administrative law and has been consistently applied in various judicial settings. The Federal Court in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169, while dealing with a case of dismissal, highlighted the importance of fair hearing, stating that a public officer should not be dismissed without being heard. Although this case dealt with public law, its underlying principle resonates strongly in any judicial process where an individual's rights are at stake, in the present case, the father of the child.

[7] The application of this rule is not confined to formal hearings. It extends to ensuring that all parties who stand to be affected by an order are given notice of the proceedings and an opportunity to make representations, present

A evidence, and cross-examine witnesses where appropriate. It equally applies to IPOs and child welfare. Interim protection orders, particularly those concerning the welfare of children, are serious matters. They are issued to safeguard children from harm and are often granted expeditiously due to the urgency of the situation. However, once such an order is in place, any
B application to set it aside directly impacts the child's safety and the rights of the party who sought and obtained the order.

[8] The father, having obtained the IPO, had a legitimate expectation that
C the order would remain in force unless good cause was shown for its variation or discharge, and that he would be given an opportunity to be heard when there is contest vide an application to have it set aside. The setting aside of the IPO without his knowledge or input effectively deprived him of the protection afforded by the order and potentially jeopardised the child's welfare, without
D him having a say in the matter.

[9] Likewise, the Welfare Department or JKM plays a crucial role in child protection. Their involvement in cases involving protection orders is often vital, as they conduct investigation, provide reports, and monitor the child's
E well-being. To set aside an IPO without their knowledge or input undermines their statutory functions and the overarching public interest in child protection.

[10] While an ex parte application is permissible in certain circumstances,
F typically where there is extreme urgency or a risk of prejudice if notice were given, they are generally intended to be temporary in nature. The very nature of an ex parte order dictates that it should be reviewed at the earliest opportunity with all parties present, to ensure that the principles of natural justice are upheld.

G

[11] An application to set aside an existing order, particularly one that affects substantive rights or the welfare of a child, is not a matter that should ordinarily be dealt with ex parte. The rationale for granting an IPO ex parte (ie, immediate protection of the child) does not apply to an application to set it
H aside. In fact, the potential for injustice is significantly higher when an existing protective measure is unilaterally removed.

[12] The case of *Re B (Care Proceedings: Notification of Father without Parental Responsibility)* [1999] 2 FLR 408, a common law authority, but
I illustrative of the principle, highlights the general reluctance of courts to make significant orders concerning children without all parties being heard. While not directly on point concerning setting aside an IPO, the underlying principle is that decisions affecting children should ideally be made with the fullest possible information and input from all interested parties.

DECISION

[13] In the present case, the magistrate's decision to allow the mother's application to set aside the IPO ex parte constitutes a clear breach of the *audi alteram partem* rule. The father, as the party who obtained the IPO and whose rights were directly affected, was not given notice or an opportunity to be heard. The Welfare Department, with its significant interest in child welfare, was also not cited. The argument that the application was merely to 'set aside' and therefore could be heard ex parte is untenable. Setting aside a protective order has profound consequences, potentially exposing the child to the very harm the IPO sought to prevent. It is not a mere procedural formality. The failure to hear the father and the Welfare Department renders the order made by the magistrate fundamentally flawed and unsustainable. It is a nullity, or at best, voidable, due to the egregious procedural irregularity.

[14] The principle of natural justice is not a mere technicality; it is essential to the administration of justice. Its breach in this instance undermines the fairness and legitimacy of the judicial process.

[15] For the reasons elaborated, I find that the order made by the magistrate allowing the mother's application to set aside the IPO ex parte was made in clear violation of the *audi alteram partem* rule. The failure to cite the Father and the Welfare Department as parties and to afford them an opportunity to be heard is a serious procedural irregularity that vitiates the order. Therefore, the order of the magistrate allowing the application to set aside the IPO is hereby set aside.

[16] Consequently, the IPO originally granted to the father is hereby *reinstated* pending a proper hearing of the mother's application to set aside the IPO, with all necessary parties (including the father and the Welfare Department) being given due notice and a full opportunity to present their respective cases.

[17] This matter is remitted to another magistrate for a fresh hearing of the mother's application to set aside the IPO, ensuring strict compliance with the principles of natural justice. At that hearing the father and the representative of the Welfare Department shall be present, after being duly notified, with proper notice to them personally and directly, of their presence in court. It would be at that hearing all other matters pertaining to investigation of the allegation of crime against the mother of the child, which is adduced as fresh evidence in this appeal, could be raised and ventilated for the magistrate to arrive at a fair and just decision after hearing all parties, including the appellant father and the Welfare Department. It is best for the matter to be fully adjudicated by the magistrate, whom had issued the IPO to the father of the child and not this

court, which only exercises its appellate jurisdiction.

[18] The mother who is aggrieved with the decision of this court, has now appealed to the Court of Appeal. For completeness, it has to be emphasised that the appeal filed is incompetent for the following bases:

(a) pursuant to s 3 of the CJA, 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. The order made by this court to have the IPO reinstated and for another magistrate to rehear the setting aside application is not a final order disposing of the rights of parties, including the mother, as her rights could still be ventilated before the magistrate who would hear the matter afresh.

(b) further, pursuant to s 50(2) of the CJA, an appeal shall lie to the Court of Appeal, with the *leave of the Court of Appeal*, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a magistrates' court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision. An application for leave shall be made within fourteen days after the date of the decision of the High Court. Therefore, the order made by this court is not automatically appealable, pursuant to s 50(2) of the CJA, as since the matter originates from the magistrate court, leave of the Court of Appeal has to be obtained first before the aggrieved party pursue with this appeal. That is not pursued, hence the appeal filed herein is incompetent for want of compliance with the salient provisions of the CJA.

Interim protection order reinstated.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh